

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON ALLEN MORGAN,

Defendant-Appellant.

UNPUBLISHED

March 18, 2003

No. 237082

Genesee Circuit Court

LC No. 00-007087-FC

Before: Griffin, P.J., and Neff and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his sentence of nine years, six months to twenty years for his conviction of assault with intent to do great bodily harm less than murder, MCL 750.84, entered after a jury trial. We affirm.

At trial, the evidence showed that complainant Hector Guerra was walking down the street when defendant's vehicle passed him, then turned, and approached him. Guerra, who knew defendant suspected him of breaking into defendant's home, attempted to flee by running through yards and jumping over fences. Defendant drove through yards and around fences in pursuit of Guerra and finally shot Guerra in the back as he continued to run. The jury convicted defendant of assault with intent to do great bodily harm less than murder, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b.

The applicable statutory sentencing guidelines recommended a minimum term range of thirty-eight to 114 months for the conviction of assault with intent to do great bodily harm less than murder. The trial court scored Offense Variable (OV) 4, MCL 777.34, psychological injury to victim, at ten points for serious psychological injury requiring treatment for all offenses, OV 7, MCL 777.37, aggravated physical abuse, at fifty points based on a finding that the victim was treated with "terrorism, sadism, torture, or excessive brutality" for all offenses, and OV 10, MCL 777.40, exploitation of a vulnerable victim, at fifteen points for predatory conduct for the weapons offenses only. Defense counsel raised no objections to the scoring of the sentencing guidelines. The trial court sentenced defendant as a third habitual offender to terms of nine years, six months to twenty years for assault with intent to do great bodily harm less than murder, four years nine months to ten years for felon in possession of a firearm, and four years, nine months to ten years for carrying a concealed weapon, and to the mandatory two-year term for felony-firearm.

Defendant claimed an appeal in which he argued that he was entitled to resentencing on the ground that the trial court erred in scoring OV 4, 7, and 10,¹ and also filed a motion to remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), to determine whether trial counsel rendered ineffective assistance by failing to object to the guidelines scoring for his conviction of assault with intent to do great bodily harm less than murder. Another panel of this Court granted the motion to remand and retained jurisdiction.²

After a hearing, the trial court concluded that the scoring of both OV 4 and OV 10 should be changed to zero points on the ground that no evidence showed either that Guerra required treatment for a psychological injury or that defendant engaged in predatory conduct. The trial court declined to change the scoring of OV 7 from fifty to zero points. The trial court observed that OV 7 defined “terrorism” as “conduct designed to substantially increase the fear and anxiety a victim suffers during the offense,” MCL 777.37(2)(a),³ and found that defendant’s conduct in pursuing Guerra was designed to substantially increase the fear and anxiety that Guerra felt during the incident. The trial court determined that trial counsel did not render ineffective assistance by failing to object to the scoring of OV 7 for the reason that an objection would not have resulted in a scoring change. The trial court concluded that resentencing was not warranted.

Defendant argues that he is entitled to resentencing on his conviction of assault with intent to commit great bodily harm less than murder⁴ because the trial court erred in scoring OV 7 at fifty points. He emphasizes that in order to find that a perpetrator engaged in “terrorism”

¹ In his original brief on appeal defendant acknowledged that while MCL 769.34(10) provides that a challenge to the scoring of the sentencing guidelines must be made at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court, MCR 6.429(C) provides that a challenge to the scoring of the sentencing guidelines may not be raised unless the party raised the issue before or at sentencing or demonstrates that it was raised as soon as the inaccuracy could reasonably have been discovered. Defendant observed that in *People v McGuffey*, 251 Mich App 155; 649 NW2d 801 (2002), another panel of this Court held that the provisions of the court rule control, but that in *People v Wilson*, 252 Mich App 390; 652 NW2d 488 (2002), another panel of this Court (Saad and Cooper, JJ., concurring separately), held that the provisions of the statute control. Defendant asserted that an unpreserved guidelines scoring issue can be reviewed for plain error, *People v Kimble*, 252 Mich App 269, 278-279; 651 NW2d 798 (2002), or as evidence of ineffective assistance of counsel, *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001).

² The remand order did not address the preservation issue; however, by granting the motion to remand, this Court seems to have concluded that defendant properly preserved the guidelines scoring issue. MCL 769.34(10). Ultimately, the question whether defendant preserved the guidelines scoring issue is moot in this case because defendant is not entitled to resentencing under any circumstances.

³ 2002 PA 137, effective April 22, 2002, deleted “terrorism” from the list of behaviors in MCL 777.37 that warrant a score of fifty points for OV 7. Terrorism is now defined in OV 20, MCL 777.49a, to include behaviors associated with the use or the threat to use biological, chemical, or radioactive devices or substances, or incendiary or explosive devices. The prior version of MCL 777.37 applies in this case. See MCL 769.34(2).

⁴ Defendant does not challenge his sentences for his other convictions.

sufficient to warrant scoring OV 7 at fifty points, the evidence must show that the perpetrator engaged in conduct “designed to substantially increase the fear and anxiety” felt by the victim during the offense, and asserts that while his conduct may have made Guerra feel frightened and anxious, no evidence showed that his conduct was specifically designed to produce those feelings. We disagree and affirm defendant’s sentence. In calculating the sentencing guidelines, the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. A scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Contrary to defendant’s assertion, he did not engage in only that conduct necessary to commit the offense of assault with intent to do great bodily harm less than murder. The evidence showed that when Guerra recognized defendant’s car he began running because he knew that defendant suspected him of breaking into defendant’s home. Defendant did not shoot at Guerra at that point. Defendant drove through yards and around fences in pursuit of Guerra. Guerra testified that at one point defendant very nearly struck him with the car. The evidence showed that defendant pursued Guerra like a hunter, refrained from striking him with his car only to pursue him further and to prolong the incident and finally shot him in the back as he continued to run. The evidence supported the trial court’s scoring of OV 7 at fifty points. *Id.* Defendant’s minimum sentence for assault with intent to do great bodily harm less than murder was within the guidelines as properly scored by the trial court. Defendant is not entitled to resentencing on that conviction. MCL 769.34(10).

Affirmed.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Hilda R. Gage